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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

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JESSE VAN EPPS, ) No. CV-07-284-CI  
Plaintiff, ) ORDER GRANTING PLAINTIFF'S  
v. ) MOTION FOR SUMMARY JUDGMENT  
MICHAEL J. ASTRUE, Commissioner ) AND DENYING DEFENDANT'S  
of Social Security, ) MOTION FOR SUMMARY JUDGMENT  
Defendant. )

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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.  
Rec. 14, 20.) Attorney Maureen J. Rosette represents Plaintiff;  
Special Assistant United States Attorney L. Jamala Edwards  
represents Defendant. The parties have consented to proceed before  
a magistrate judge. (Ct. Rec. 4.) After reviewing the  
administrative record and briefs filed by the parties, the court  
**GRANTS** Plaintiff's Motion for Summary Judgment and **REVERSES AND**  
**REMANDS** the matter to the Commissioner for additional proceedings  
pursuant to 42 U.S.C. §405(g).

**JURISDICTION**

On July 21, 2003, Plaintiff Jesse Van Epps (Plaintiff)  
protectively filed for Social Security Income benefits. (Tr. 263-  
65, 289.) Plaintiff alleged disability due to lung problems and

1 depression, with an alleged onset date of July 15, 2002.<sup>1</sup> (Tr.  
2 280.) Benefits were denied initially and on reconsideration. (Tr.  
3 244.) Plaintiff requested a hearing before an administrative law  
4 judge (ALJ), which was held on April 27, 2005, and July 28, 2005,  
5 before ALJ Paul Gaughen. (Tr. 438-467.) Plaintiff testified  
6 without counsel at the first hearing. (Tr. 439-52.) At the second  
7 hearing, Plaintiff was represented by counsel; vocational expert  
8 Sharon Welter testified. (Tr. 457-66.) The ALJ denied benefits on  
9 March 10, 2006, and the Appeals Council denied review. (Tr. 5-8.)  
10 The instant matter is before this court pursuant to 42 U.S.C.  
11 § 405(g).

12 **STATEMENT OF THE CASE**

13 The facts of the case are set forth in detail in the transcript  
14 of proceedings and are briefly summarized here. At the time of the  
15 hearing, Plaintiff was 41 years old, single and living in a rented  
16 basement room of a friend's house. (Tr. 450, 457.) He had an 11<sup>th</sup>-  
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18 <sup>1</sup> Plaintiff was awarded SSI benefits in 1997, due to disabling  
19 limitations caused by affective disorders and alcohol dependence.  
20 (Tr. 225.) The evidence indicates Plaintiff has a history of drug  
21 and alcohol abuse and went to a treatment program in 1994. (Tr.  
22 222.) In the 1997 decision, the ALJ found Plaintiff continued to  
23 use alcohol "on an occasional basis," but not to the level of  
24 intoxication. He concluded "drug addiction and alcoholism are not  
25 contributing factors material to the determination of disability."  
26 (Tr. 226.) Plaintiff's benefits were discontinued in May 2001, for  
27 failure to respond to agency requests for updated information about  
28 his disability. (Tr. 234.)

1 grade education and completed his high-school equivalency degree.  
2 (Tr. 286.) He denied regular alcohol use, but stated he drank beer  
3 on an occasional basis and did not over-use alcohol. (Tr. 447.) He  
4 testified he did little cooking and some household chores. He had  
5 an "extreme fear" of people, and preferred to be alone. He stated  
6 he did not engage in social or recreational activities. (Tr. 448-  
7 50.) Plaintiff had past relevant work experience as a fish cleaner,  
8 warehouse laborer, and janitor. (Tr. 281, 445-46, 457.) He  
9 testified he last worked in 2003, and that is why his benefits were  
10 terminated. (Tr. 444.) He stated he had never been fired from a  
11 job but quit due to weakness caused by depression and his lung  
12 condition. (Tr. 448.)

#### 13                   **ADMINISTRATIVE DECISION**

14       At step one, ALJ Gaughen found Plaintiff had not engaged in  
15 substantial gainful activity during the relevant time. (Tr. 83.)  
16 At step two, he found Plaintiff had severe impairments of chronic  
17 obstructive pulmonary disease and asthma. *Id.* He also found that  
18 "when the effects of his alcohol dependence are considered, the  
19 claimant has a severe impairment due to depression." (Tr. 84.) At  
20 step three, he determined Plaintiff's "severe respiratory  
21 impairments" did not meet or equal the requirements of Section 12.09  
22 of 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings).  
23 (Tr. 85.) He found Plaintiff's medically determinable impairments  
24 "could reasonably be expected to produce the alleged symptoms," but  
25 Plaintiff's subjective symptom complaints regarding limitations were  
not totally credible. (Tr. 86.) At step four, the ALJ found  
Plaintiff had the residual functional capacity (RFC) to perform a

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1 wide range of light work, but would be "unable to perform work that  
 2 would involve "lifting or carrying more than 20 pounds occasionally  
 3 or more than 10 pounds frequently or exposure to dust, fumes or  
 4 other respiratory inhalants." (Tr. 85.) He found Plaintiff could  
 5 not perform past relevant work (Tr. 87), but a significant number of  
 6 jobs existed in the national economy that he could perform. (Tr.  
 7 88.) The ALJ concluded Plaintiff was not "disabled," as defined by  
 8 the Social Security Act. (Tr. 89.)

#### 9 STANDARD OF REVIEW

10 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
 11 court set out the standard of review:

12 A district court's order upholding the Commissioner's  
 13 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
 14 Commissioner may be reversed only if it is not supported  
 by substantial evidence or if it is based on legal error.  
*Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
 15 Substantial evidence is defined as being more than a mere  
 scintilla, but less than a preponderance. *Id.* at 1098.  
 16 Put another way, substantial evidence is such relevant  
 evidence as a reasonable mind might accept as adequate to  
 17 support a conclusion. *Richardson v. Perales*, 402 U.S.  
 389, 401 (1971). If the evidence is susceptible to more  
 18 than one rational interpretation, the court may not  
 substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169  
 19 F.3d 595, 599 (9th Cir. 1999).

20 The ALJ is responsible for determining credibility,  
 21 resolving conflicts in medical testimony, and resolving  
 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 22 Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
 23 construction of the applicable statutes. *McNatt v. Apfel*,  
 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 25 SEQUENTIAL PROCESS

26 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 27 requirements necessary to establish disability:  
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Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If there is substantial evidence to support the administrative

1 findings, or if there is conflicting evidence that will support a  
2 finding of either disability or non-disability, the finding of the  
3 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
4 1230 (9<sup>th</sup> Cir. 1987).

5 **ISSUES**

6 The question is whether the ALJ's decision is supported by  
7 substantial evidence and free of legal error. Plaintiff argues the  
8 ALJ erred when he: (1) found Plaintiff has no severe mental  
9 impairment at step two; (2) found Plaintiff has the residual  
10 functional capacity to do light work; (3) improperly rejected  
11 treating, examining and non-examining physicians' opinions; and (4)  
12 erroneously evaluated Plaintiff's limitations with the effects of  
13 alcohol. He contends the record does not include a current  
14 diagnosis of alcohol addiction; therefore, there was no requirement  
15 to consider alcohol abuse in assessing limitations caused by his  
16 medically determinable depression. (Ct. Rec. 15 at 13-17.)

17 **DISCUSSION**

18 **A. Step Two - Severe Mental Impairments**

19 To satisfy step two's requirement of a severe impairment, the  
20 claimant must prove the existence of a physical or mental impairment  
21 by providing medical evidence consisting of signs, symptoms, and  
22 laboratory findings; the claimant's own statement of symptoms alone  
23 will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms  
24 must be evaluated on the basis of a medically determinable  
25 impairment which can be shown to be the cause of the symptoms. 20  
26 C.F.R. § 416.929. Once medical evidence of an underlying impairment  
27 has been shown, medical findings are not required to support the  
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1 alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345  
2 (9th Cir. 1991).

3 At step two, the ALJ must consider the combined effect of all  
4 of the claimant's impairments on the ability to function, without  
5 regard to whether each alone was sufficiently severe. See 42 U.S.C.  
6 § 423(d)(2)(B) (Supp. III 1991). A mental impairment generally is  
7 considered non-severe for purposes of step two if the degree of  
8 limitation in the three functional areas of activities of daily  
9 living, social functioning, and concentration, persistence or pace  
10 is rated as "none" or "mild" and there have been no episodes of  
11 decompensation. 20 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1). The  
12 ALJ must consider the combined effect of all of the claimant's  
13 impairments on the ability to function, without regard to whether  
14 each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)  
15 (Supp. III 1991). The regulations reflect "[g]reat care should be  
16 exercised in applying the not severe impairment concept." SSR 85-  
17 28. Unless an adjudicator is able to determine clearly that an  
18 impairment alone, or in combination with other impairments, does not  
19 affect an individual's ability to perform basic work activities, the  
20 sequential evaluation process should not end at step two. The step  
21 two inquiry is a *de minimis* screening device to dispose of  
22 groundless or frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137,  
23 153-154 (1987).

24       **1. Consideration of Drug and Alcohol Addiction at Step Two**

25       The Contract with America Advancement Act of 1996 (CAAA)  
26 amended the Social Security Act, providing that "an individual shall  
27 not be considered to be disabled . . . if alcoholism or drug  
28 addiction would . . . be a contributing factor material to the

1 Commissioner's determination that the individual is disabled." 42  
2 U.S.C. § 423(d)(2)(C). Special statutes and regulations govern  
3 disability claims that involve substance abuse. Specifically, the  
4 ALJ must follow a two step analysis that incorporates the sequential  
5 evaluation discussed above. 20 C.F.R. §§ 404.1535(a), 416.935(a).  
6 The ALJ first must conduct the five-step inquiry without attempting  
7 to determine the impact of substance addiction. If the ALJ finds  
8 that the claimant is not disabled under the five-step inquiry, the  
9 claimant is not entitled to benefits, and there is no need to  
10 proceed with further analysis. *Id.* If the ALJ finds the claimant  
11 disabled, and there is medical evidence of substance addiction, the  
12 ALJ should proceed under a second sequential evaluation and §§  
13 404.1535 or 416.935 to determine if the claimant would still be  
14 disabled absent the substance addiction. *Bustamante v. Massanari*,  
15 262 F.3d 949, 955 (9<sup>th</sup> Cir. 2001). If found disabled with the  
16 effects of substance addiction, it is the claimant's burden to prove  
17 substance addiction is not a contributing factor material to his  
18 disability. *Parra v. Astrue*, 481 F.3d 742, 748 (9<sup>th</sup> Cir. 2007).

19 It is noted at the outset of *de novo* review that the ALJ made  
20 no finding that Plaintiff had an impairment (severe or non severe)  
21 of alcohol abuse or addiction. Nonetheless, at step two ALJ Gaughen  
22 found "when the effects of his alcohol dependence are considered,  
23 the claimant has a severe impairment due to depression." He found  
24 further that "without the effects of alcohol abuse," Plaintiff did  
25 not have a severe mental impairment. (Tr. 84.) The ALJ then  
26 proceeded to evaluate Plaintiff's physical impairments without first  
27 conducting a sequential evaluation "with the effects" of the alleged  
28 alcohol abuse. This analysis is contrary to the Commissioner's

1 regulations governing cases that involve substance abuse and mental  
 2 impairments discussed above. 20 C.F.R. §§ 416.935, .1520a;  
 3 *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001).  
 4 Further, the ALJ did not consider the effects of alleged alcohol  
 5 abuse or non-severe mental impairments in combination and with  
 6 Plaintiff's physical impairments as required 42 U.S.C.  
 7 § 423(d)(2)(B)(Supp. III 1991). Assuming substance addiction or  
 8 abuse is a factor in this claim, the ALJ erred in his sequential  
 9 evaluation.

10 However, the Regulations provide that the Commissioner will  
 11 assess whether alcoholism is a contributing factor material to the  
 12 determination of disability only if (1) the claimant is disabled,  
 13 and (2) there is medical evidence of his alcoholism. 20 C.F.R. §  
 14 416.935(a). In this case, neither prerequisite is met. As  
 15 discussed above, the ALJ made no finding of disability with the  
 16 effects of substance addiction. An independent review of the  
 17 medical evidence for the instant claim indicates there are  
 18 references to a history of alcohol abuse (e.g., Tr. 193, 205, 222,  
 19 336), but there is no objective medical evidence of ongoing alcohol  
 20 abuse during the relevant period.<sup>2</sup>

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23       <sup>2</sup> Although there was evidence of alcohol dependency in the  
 24 Plaintiff's first claim, the ALJ in 1997 determined it was not a  
 25 contributing factor material to Plaintiff's disability caused by his  
 26 "severe affective mental disorder." (Tr. 225-26.) In the instant  
 27 claim, there is no evidence to support a finding that alcohol  
 28 addiction is a contributing factor material to a disability.

1       2.    Rejection of Medical Source Opinions at Step Two

2           To support his finding that Plaintiff had no severe mental  
3 impairments without the effects of alcohol, the ALJ rejected the  
4 opinions of medical sources who examined Plaintiff during the  
5 relevant period and agency non-examining psychologists who diagnosed  
6 Plaintiff with affective and personality disorders. (Tr. 86-87.)

7           In August and October 2003, Deborah Brown, Ph.D., assessed  
8 Plaintiff and opined he was unable to work due to recurrent major  
9 depression. She concluded he was unlikely to seek treatment due to  
10 his symptomology. She also diagnosed dysthymia and personality  
11 disorder, NOS and recommended a chemical dependency evaluation to  
12 rule out alcohol abuse, based on his self-report of alcohol  
13 consumption the day of the evaluation. (Tr. 328, 413, 415.) She  
14 did not diagnose chemical dependency or alcoholism.

15          Psychiatrist David Bot, M.D., evaluated Plaintiff in December  
16 2003, and diagnosed major depression (mild to moderate severity),  
17 alcohol abuse by history, and malingering. He also diagnosed  
18 personality disorder, and opined this condition could be a "major  
19 factor" in Plaintiff's depression. (Tr. 337.) He concluded  
20 Plaintiff would have mild to moderate limitations in concentration,  
21 persistence and pace due to his mental disorders. (Tr. 336-37.)

22          The ALJ rejected the Dr. Brown's opinions and the severity of  
23 limitations assessed by Dr. Bot. (Tr. 84.) Plaintiff argues the  
24 ALJ improperly rejected these examining source opinions at step two,  
25 as well as the opinions of reviewing psychologists Edward Beatty,  
26 Ph.D., and Michael Brown, Ph.D., who diagnosed affective disorders  
27 that caused moderate to marked limitations on Plaintiff's ability to  
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1 work.

2 In disability proceedings, a treating or examining physician's  
3 opinion is given more weight than that of a non-examining physician.  
4 *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). The ALJ gave  
5 Dr. Brown's opinions little weight because she was not a treating  
6 physician, her opinions were rendered for an application for state  
7 benefits, and she only examined Plaintiff two times. (Tr. 85.)  
8 These reasons are not legally sufficient. Case law requires the  
9 opinions of examining physicians, when uncontroverted, be rejected  
10 only with "clear and convincing" reasons. If contradicted, the  
11 reasons must be specific and legitimate, and supported by the  
12 record. *Lester v. Chater*, 81 F.3d 830, 830-831 (9<sup>th</sup> Cir. 1995).  
13 The fact that Dr. Brown is not a treating psychologist does not meet  
14 either standard. Her opinion is uncontradicted and is substantially  
15 consistent with Dr. Bot's opinions. Further, it is well settled  
16 that the purpose for which a medical exam is obtained has no bearing  
17 on the weight given in disability proceedings. *Lester*, 81 F.3d at  
18 832. The ALJ also found Dr. Brown did not use standardized testing  
19 in her evaluation. This finding is not supported by the record.  
20 Dr. Brown did conduct objective testing (Trails A and B and a  
21 Personality Assessment Inventory) which indicated Plaintiff was  
22 moderately to severely impaired. (Tr. 327-28.) Based on objective  
23 testing, she assessed marked and moderate severity and functional  
24 limitation in social and cognitive abilities. (Tr. 330, 331, 415-  
25 16.) Further, Dr. Deborah Brown's diagnoses (which were not  
26 specifically rejected by the ALJ) are consistent with the findings  
27 of Dr. Bot, who examined Plaintiff one time and administered no  
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<sup>1</sup> objective tests.<sup>3</sup> (Tr. 84, 333-37.)

Finally, the ALJ discounted Dr. Brown's assessment because she did not consider the "effects of alcohol addiction." (Tr. 84.) Regarding alcohol dependency, Dr. Brown stated in her narrative report that Plaintiff reported a history of alcohol abuse and had consumed four beers the day of the interview. Nonetheless, she did not opine there was evidence of alcohol addiction or abuse. Rather, she specifically noted that the PAI results supported Plaintiff's complaints.<sup>4</sup> She concluded "it appears his depressive symptoms are primary and historically chronic," and recommended a chemical dependency evaluation. (Tr. 411.) Thus, she expressly opined

<sup>3</sup> Contrary to the ALJ's findings, Dr. Brown did not give a firm diagnosis of "alcohol dependence" or "alcohol abuse." (Tr. 84, 415.) These were listed in Dr. Brown's October 2003 evaluation as possible diagnoses, requiring additional information to establish or rule out the condition. (*Id.*, see also Tr. 330)

<sup>4</sup> Although credibility findings are not challenged, it is noted on independent review that the ALJ rejected Plaintiff's allegations of depression symptoms based on his failure to seek treatment. (Tr. 86.) Although an unexplained failure to seek treatment or follow a prescribed course of treatment may negatively affect a claimant's credibility determination, *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989), the courts have cautioned that "it is a questionable practice to chastise one with a mental impairment for the exercise of poor judgment in seeking rehabilitation." *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9<sup>th</sup> Cir. 1996) (quoting *Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6<sup>th</sup> Cir. 1989)).

1 Plaintiff's depressive symptoms were not caused by or exacerbated by  
2 alcohol abuse. The ALJ's reasons for rejecting Dr. Brown's opinions  
3 are not legally sufficient or supported by substantial evidence.

4 Although Dr. Bot diagnosed alcohol abuse "by history," he did  
5 not opine that Plaintiff's major depression and personality disorder  
6 diagnoses were a result of alcohol abuse. Dr. Bot found mild to  
7 moderate limitations in social functioning, and recommended  
8 treatment with anti-depressant medication. (Tr. 337.) The ALJ did  
9 not specifically reject Dr. Bot's diagnoses or limitations assessed.  
10 Rather, it appears he relied solely on Dr. Bot's diagnosis of  
11 malingering as a reason to disregard Dr. Bot's assessment of  
12 functional limitations. However, reviewing the evaluation in its  
13 entirety, it is noted that Dr. Bot qualified the malingering  
14 diagnosis, stating "even though the diagnosis of major depression is  
15 made . . . there is probably embellishment of symptomology." Thus,  
16 Dr. Bot's diagnoses and limitation assessment factored in the  
17 embellishment, and were not negated totally by the malingering  
18 findings. The ALJ erred at step two in isolating only the  
19 malingering diagnosis and failing to give "clear and convincing"  
20 reasons for rejecting Dr. Bot's and Dr. Brown's opinions that  
21 Plaintiff suffered mild to moderately severe depression. See e.g.,  
22 *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9<sup>th</sup> Cir. 2001).

23 The examining medical source opinions are consistent with  
24 reports from non-examining agency psychologists who reviewed the  
25 records. (Tr. 347-63, 393-95.) "State agency medical and  
26 psychological consultants are highly qualified physicians and  
27 psychologists who are experts in the evaluation of medical issues in  
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1 disability claims under the Social Security Act." *Social Security*  
2 *Ruling* (SSR) 96-6p. Their findings of fact must be treated as  
3 expert opinion evidence of non-examining sources by the ALJ, who can  
4 give weight to these opinions only insofar as they are supported by  
5 evidence in the case record. The ALJ cannot ignore these opinions  
6 and must explain the weight given. *Id.* The opinion of a non-  
7 examining physician may be accepted as substantial evidence if it is  
8 supported by other evidence in the record and is consistent with it.  
9 *Andrews*, 53 F.3d at 1043; *Lester*, 81 F.3d at 830-31.

10 Reviewing psychologists Dr. Michael Brown and Dr. Beatty found  
11 affective and personality disorders, and Dr. Brown noted alcohol  
12 abuse, "by history," only. (Tr. 347.) Dr. Beatty found affective  
13 and personality disorders, but found no evidence of substance  
14 addiction. (Tr. 383.) Both agency psychologists assessed mild and  
15 moderate mental limitations, including moderate limitations in  
16 concentration, persistence and pace. These opinions are consistent  
17 with Dr. Bot's unrejected opinions. (Tr. 337, 357, 393.) The ALJ  
18 rejected Dr. Michael Brown's opinions, stating limitations were not  
19 assessed "absent consideration of alcohol addiction." (Tr. 87.) As  
20 discussed above, medical records for the relevant period do not  
21 include objective medical evidence of alcohol addiction, therefore  
22 the ALJ's reason for rejecting Dr. Michael Brown's opinion is  
23 neither "clear and convincing" nor specific and legitimate. The ALJ  
24 did not reject Dr. Beatty's opinions, therefore, his diagnoses and  
25 functional limitations are credited as a matter of law. *Lester*, 81  
26 F.3d at 834. The objective medical evidence, including improperly  
27 rejected medical opinions of Drs. Deborah Brown, Bot, and Michael  
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1 Brown, is sufficient to establish a severe mental impairment of  
 2 depression at step two. 20 C.F.R. § 416.920a; *Webb v. Barnhart*,  
 3 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

4 **B. Remedy**

5 Because the ALJ's error at step two taints the entire  
 6 sequential evaluation, most notably the residual functional  
 7 assessment,<sup>5</sup> it is unclear from the record whether Plaintiff's  
 8 impairments, alone and in combination, are disabling. Therefore,  
 9 remand for additional proceedings is appropriate. *Smolen v. Chater*,  
 10 80 F.3d 1273, 1292 (9<sup>th</sup> Cir. 1996). On remand, if the ALJ considers  
 11 the evidence regarding alcohol use ambiguous or inadequate for  
 12 proper evaluation, the ALJ shall further develop the record with a  
 13 chemical dependency evaluation.<sup>6</sup> If medically determinable substance

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15       <sup>5</sup> The residual functional capacity assessment (RFC) is what an  
 16 individual can still do despite his functional limitations. The RFC  
 17 is based "on all of the relevant evidence in the case record,  
 18 including information about the individual's symptoms and any  
 19 'medical source statements' -- i.e., opinions about what the  
 20 individual can still do despite his or her impairments -- submitted  
 21 by an individual's treating source or other acceptable medical  
 22 sources." SSR 96-8p.

23       <sup>6</sup> It appears Plaintiff was not represented at the first  
 24 hearing; therefore, the ALJ had a heightened duty to develop the  
 25 record by ordering a consultative chemical dependency evaluation (as  
 26 recommended by Dr. Brown) to resolve any ambiguity in the record  
 27 regarding Plaintiff's alcohol use or abuse. *Mayes v. Massanari*, 276  
 28 F.3d 453, 4509-60 (9<sup>th</sup> Cir 2001).

addiction or alcoholism is a consideration, the ALJ shall conduct a proper sequential evaluation pursuant to 20 C.F.R. § 416.935. The ALJ shall reevaluate the opinions of the medical source opinions, explain the weight given to acceptable medical sources, and, if necessary, provide legally sufficient reasons for rejecting acceptable medical source opinions. A new RFC determination will be required based on the new evidence and medical source opinions. Plaintiff may submit additional evidence. If necessary, the ALJ will take medical expert testimony and vocational expert testimony at a new hearing. Accordingly,

**IT IS ORDERED:**

12       1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
13 **GRANTED**. This matter is remanded to the Commissioner for additional  
14 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) and as  
15 directed in the decision above.

16           2.    Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is  
17 **DENIED.**

18       3. An application for attorney fees may be filed by separate  
19 motion.

20 The District Court Executive is directed to file this Order and  
21 provide a copy to counsel for Plaintiff and Defendant. Judgment  
22 shall be entered for Plaintiff and the file shall be CLOSED.

23 || DATED October 10, 2008.

S/ CYNTHIA IMBROGNO

UNITED STATES MAGISTRATE JUDGE